

EXHIBIT 11
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ORIGINAL

MONSTER ENERGY COMPANY,
a Delaware corporation,

Case No.
5:18-cv-1882-JGB-SHK

Plaintiff,

v.

VITAL PHARMACEUTICALS, INC.
d/b/a VPX Sports, a Florida
corporation; and JOHN H.
OWOC a.k.a JACK OWOC, an
individual,

Defendants.

CONFIDENTIAL

Remote deposition via Zoom of PETER
KENT, taken on Monday, June 21, 2021,
commencing at 8:06 a.m. PST, before Deborah L.
Williams, a Certified LiveNote Reporter and a
Notary Public.

JOB No. 21-100820

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2 CENTRAL DISTRICT OF CALIFORNIA

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5 a Delaware corporation, 5:18-cv-1882-JGB-SHK

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17 Notary Public.

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1 A P P E A R A N C E S :

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14 ALSO PRESENT:

15 Aaron Sonnhalter, Esquire
16 Brenda Dandridge - Videotape technician
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E X H I B I T S

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1 VIDEOTAPE TECHNICIAN: Good morning.

2 We are now on the record. Today's date is
3 June 21, 2021, and the time is 8:06 a.m.
4 Pacific Standard Time.

5 This is the video deposition of
6 Peter Kent being taken in the matter of
7 Monster Energy Company versus Vital
8 Pharmaceuticals, Inc., et al., pending in
9 the United States District Court, Central
10 District of California, Case Number
11 5:18-cv-1882-JGB-SHK. This deposition is
12 being taken via remote connection on the
13 part of the videographer and the court
14 reporter. The videographer is Brenda
15 Dandridge of The Sullivan Group of Court
16 Reporters.

17 Would counsel please identify
18 yourselves and state whom you represent.

19 MR. MISHRA: This is Sourabh Mishra
20 for Plaintiff Monster Energy Company from
21 Hueston Hennigan.

22 MR. BRANSON: This is Tim Branson
23 from Gordon Rees on behalf of the defendants
24 and representing the deponent today.

25 VIDEOTAPE TECHNICIAN: Thank you.

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1 The court reporter is Deborah Williams also
2 of The Sullivan Group, and she may now swear
3 in the witness.

4 - - -

5 PETER KENT, after having been duly
6 sworn, was examined and testified as
7 follows:

8 - - -

9 MR. MISHRA: I also just want to
10 state for the record that Monster in-house
11 counsel Aaron Sonnhalter is attending as
12 well.

13 - - -

14 EXAMINATION

15 - - -

16 BY MR. MISHRA:

17 Q. Good morning, Mr. Kent.

18 A. Good morning.

19 Q. Can you please state your full name
20 for the record?

21 A. Peter William Kent.

22 Q. And, Mr. Kent, have you been deposed
23 before?

24 A. I have.

25 Q. And how many times have you been

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1 Q. Did you have any staff or anyone
2 else assisting you in writing the rebuttal
3 expert report?

4 A. I did not.

5 Q. So you reviewed -- strike that.
6 You're aware of Monster's opening
7 expert report submitted by Professor Gregory
8 Carpenter, correct?

9 A. Yes.

10 Q. And you reviewed Dr. Carpenter's
11 expert report, correct?

12 A. Yes.

13 Q. What did you do -- strike that.
14 Did you review the entirety of Dr.
15 Carpenter's expert report?

16 A. I'm pretty sure I read every word,
17 but I focused on the areas that were related to
18 my expertise.

19 Q. Did you form any opinions about the
20 sections of Dr. Carpenter's report that are not
21 related to your expertise?

22 A. Well, no, my opinions are in the
23 report. You read the report. That's what the
24 opinions are. I don't have opinions related to
25 other areas of his report.

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1 Q. Is it fair to say the only section
2 of Dr. Carpenter's report that you have
3 opinions on are his discussion of VPX's social
4 media advertising?

5 A. Yes, as far as expert opinions, you
6 know, I have personal opinions about different
7 pieces. But as far as expert opinions go, it's
8 what's in the report, which is the social media
9 stuff.

10 Q. And specific to VPX's social media
11 advertising, you only offer opinions
12 specifically on Dr. Carpenter's discussion and
13 analysis of VPX's marketing on Instagram,
14 correct?

15 A. That's correct, because he has a lot
16 of anecdotal information in his report, you
17 know, such-and-such a person on YouTube says
18 this, another person on Twitter says that, that
19 sort of thing, which is hard to respond to.
20 But he -- as far as Instagram goes, he got far
21 more specific with numbers, with data, and so
22 that's what I was able to respond to.

23 Q. Putting aside whether it's anecdotes
24 or specifics, you did not respond to any of
25 Dr. Carpenter's opinions or discussion relating

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1 to any social media platform other than
2 Instagram, correct?

3 A. Well, I believe that's correct, but
4 it's -- it's whatever is in my report.

5 MR. MISHRA: I'm going to introduce
6 your report as Exhibit 1 to this -- to this
7 deposition.

8 - - -

9 (Whereupon, the document was marked,
10 for identification purposes, as Defendant's
11 Exhibit 1.)

12 - - -

13 MR. MISHRA: And it's in the chat
14 section, so just let me know when you pull
15 it out, when you have it up, and I will
16 share it as well. Let me know when you're
17 ready.

18 THE WITNESS: It's loading. I'm
19 waiting for it to open. Yup, I have it
20 open.

21 BY MR. MISHRA:

22 Q. And is Exhibit 1 your expert --
23 rebuttal expert report served in this case on
24 June 4, 2021?

25 A. It certainly appears to be.

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1 Q. If you'd like to take a second to
2 look through, I'm happy to give it to you, but
3 I just want you to confirm this is your
4 rebuttal expert report.

5 A. Okay. I didn't read every word, but
6 it certainly seems to be my report.

7 Q. On page 3 of your rebuttal expert
8 report, you state -- sorry -- yeah, you state
9 that you were engaged to review and analyze
10 certain evidence and provide opinions relating
11 to various issues in this case, right?

12 A. Yes.

13 Q. Were you given a particular
14 assignment in connection with Dr. Carpenter's
15 report for your rebuttal report?

16 A. I don't remember -- I don't have a
17 written assignment. I don't recall exactly
18 what was said. Certainly to look at
19 Dr. Carpenter's comments about social media and
20 respond to them.

21 Q. If your assignment was to review
22 Dr. Carpenter's statements related to social
23 media, why focus only on the Instagram in your
24 rebuttal report?

25 A. I think I've explained that. He

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1 states that people say things on Twitter and
2 YouTube and so on and says what it is, but he
3 doesn't have any kind of analysis of those
4 areas, but he does have a specific analysis of
5 Instagram.

6 Q. It was your decision to focus on
7 what you call a specific analysis that was
8 conducted by Dr. Carpenter; is that correct?

9 A. I guess it probably was my decision
10 originally, but counsel certainly had a chance
11 to see what I was responding to and said, We
12 need you to respond to this other stuff as
13 well." So at the end of the day, it was a
14 combined decision.

15 Q. Let me share my screen again.
16 You'll see in paragraph 13 of your report that
17 you write, Additional details regarding my
18 professional experience and publications, and
19 cases in which I testified over the last four
20 years, are set forth in my CV attached as
21 Exhibit A to this report.

22 Do you see that?

23 A. I do.

24 Q. I'm going to take you to Exhibit A
25 to your report. Exhibit A is titled "CV and

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1 cases in which Kent testified in the last four
2 years."

3 A. Right. Yes.

4 Q. And the next page is just Exhibit B,
5 "Materials considered," right?

6 A. Correct. Was the CV not included?

7 Q. That was going to be my question to
8 you. Do you have a CV? It doesn't appear that
9 it was included in this Exhibit A to your
10 expert report.

11 A. It doesn't appear -- it doesn't
12 appear certainly in this version of the -- of
13 the report. That's -- if it wasn't in the
14 report you were sent, that's clearly a mistake.
15 I'd be happy to provide it.

16 Q. You intended to include a CV.
17 Exhibit A is not your CV, correct?

18 A. Well, it's not. It's just the first
19 part that I mentioned earlier, the last four
20 years of testimony, but the CV is not included,
21 correct.

22 Q. And you have a copy of your current
23 CV?

24 A. Yes.

25 Q. And you'll agree to provide a copy

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1 of your current CV?

2 A. Certainly.

3 Q. When did you first hear of
4 Instagram?

5 A. Instagram? I wouldn't know. I mean
6 years ago.

7 Q. Can you give me an estimate of when
8 you first heard about Instagram?

9 A. Sorry, I can't. I don't recall
10 Instagram's history. These social media
11 platforms have popped up over time and it's
12 hard to remember when a particular thing
13 happened.

14 Q. You consider yourself an expert
15 witness in how people use Instagram.

16 A. Correct.

17 Q. Yes, you consider yourself an expert
18 witness in how people use Instagram?

19 A. Yes.

20 Q. Okay. And can you explain to me
21 what makes you qualified to opine on how
22 consumers use Instagram?

23 A. Well, my experience. As you know,
24 an expert witness is supposed to have
25 specialized knowledge based on this -- and I

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1 don't remember the exact wording, the federal
2 rules of evidence -- but knowledge, experience,
3 training, education. I have that information,
4 information that can help me explain a fact to
5 the trier of facts.

6 Q. What training do you have that makes
7 you qualified to opine on how consumers use
8 Instagram?

9 A. Well, having used Instagram, having
10 used social media since 1984, used numerous
11 social media platforms, including Instagram.

12 Q. So what makes you qualified to opine
13 on how consumers use Instagram is your own use
14 of social media platforms; is that correct?

15 A. My extensive experience using social
16 media for, what's that, 36 years, since before
17 it was actually even called social media, and
18 my -- my work in -- working with clients,
19 helping them understand social media, my work
20 in my publications, my numerous books that
21 cover marketing online and so on.

22 Q. Which clients have you worked with
23 on -- strike that.

24 Can you tell me which specific
25 clients you've worked with relating to their

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1 marketing efforts on Instagram?

2 A. Well, I -- I don't know. Over the
3 years, I have worked with literally hundreds of
4 companies providing e-commerce consulting
5 services. I've worked with Amazon, Vero, Avvo,
6 Lonely Planet, and so on. But I've also worked
7 with literally hundreds of small to medium size
8 businesses. And my consulting covers, you
9 know, a broad range of expertise, what is SEO,
10 Web development, general marketing advice.

11 And so I've absolutely discussed
12 social media with numerous clients, but I can't
13 tell you the name of a specific client right
14 now.

15 Q. Let's take Amazon. That's the one
16 you mentioned. Did you work on any projects
17 relating to Instagram with Amazon?

18 A. Did not. None of -- we can cut it
19 short. None of those large companies I worked
20 with did we discuss -- well, no, actually,
21 Lonely Planet we may have discussed social
22 media. But Amazon, no; Avvo, no.

23 Q. Lonely -- let's take Lonely Planet
24 then. Do you recall discussing Instagram with
25 Lonely Planet?

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1 A. I do not recall discussing Instagram
2 specifically. I don't know. Maybe we did.
3 Maybe we didn't.

4 Q. Another thing that you said makes
5 you qualified to opine on how consumers use
6 Instagram is your work in your publications.

7 Which publications of yours mentions
8 Instagram?

9 A. I don't know if I have -- if I've
10 mentioned Instagram in my publications. But,
11 again, I have 36 years' experience working in
12 social media on numerous different platforms.

13 Q. You referred to a social media
14 platform that you first started working on or
15 using in the 1980s.

16 Do you recall that?

17 A. I do.

18 Q. What social media platform was that?

19 A. Actually, the very first, I'm not
20 quite sure. CompuServe I was definitely using
21 in '84, but I was also using bulletin boards
22 about the same time. I don't know which came
23 first.

24 Q. And did CompuServe or those bulletin
25 boards that you saw in the 1980s, did those

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1 have hashtags?

2 A. No, hashtags are a much more recent
3 development.

4 Q. And did those social media platforms
5 that you used in the 1980s, did those have
6 pictures?

7 A. Actually, let me back up a moment.
8 They didn't have hashtags specifically, but
9 they did have keyword indexing, and that's all
10 hashtags are; it's just a keyword index
11 function.

12 Q. Can you describe how CompuServe's
13 social media platform that you used in the
14 1980s compares to Instagram today?

15 A. How it compares? Well, they're both
16 forums for people to communicate with each
17 other online. It's not a one-way thing. Like,
18 the early Web was one way, one direction of
19 communication, the website owner communicating
20 with the website visitor. Social media is a
21 two-way communication.

22 These early systems, such as
23 CompuServe, were just that, forums for people
24 to communicate with each other.

25 Q. And you think these early forums in

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1 the 1980s apply to your understanding of how
2 Instagram works today in 2021?

3 A. Because of my experience, it gives a
4 much broader picture than Instagram. I've used
5 numerous different types of social media
6 platforms over the decades. I've seen a lot of
7 different ways these systems work. Instagram
8 is just one fairly simple system.

9 Q. Can you explain the similarities
10 between the systems that you mentioned in the
11 1980s and how Instagram functions today?

12 A. Didn't you ask that question a
13 moment ago, or is this a different question?

14 Q. It is a different question. I
15 asked, do you think that these early forums
16 apply to your understanding?

17 This is, can you explain what the
18 similarities are?

19 A. Sorry, I thought you asked this
20 question before that one, but I'll say it
21 again. I thought I gave this answer before.

22 These are both systems for people to
23 communicate. So somebody on Instagram can post
24 a picture. Somebody on CompuServe in 1984 can
25 post a picture. Somebody could come by and see

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1 it, and they could respond to the poster.

2 There's also an indexing function in both
3 systems.

4 Q. Any other similarities?

5 A. I don't know offhand. I'd have to
6 sit and think about it.

7 Q. You have social media accounts,
8 right?

9 A. I do.

10 Q. Do you know how many Instagram
11 followers you have?

12 A. No. Probably not many, but I don't
13 know the numbers.

14 Q. And you use Instagram, right? You
15 testified earlier that you use Instagram?

16 A. I do use Instagram. I don't use it
17 every day, but I do use it.

18 Q. How often do you use it?

19 A. I -- I don't know.

20 Q. Would it surprise you to know that
21 you only have 39 followers on Instagram?

22 A. No.

23 Q. Would it surprise you to know you're
24 only following six people on Instagram?

25 A. I only follow six people but for

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1 instance I use it for photography. I have an
2 interest in landscape photography, so I go in
3 and look at various photographers' work. I
4 don't have a lot of followers or follow many
5 people.

6 Q. Why don't you follow more people on
7 Instagram?

8 A. Why do I need to?

9 Q. What's the purpose of -- in your
10 experience, what's the purpose of consumers
11 following people on Instagram?

12 A. Well, if you follow somebody on
13 Instagram, then it's going to -- their posts
14 will appear in your feed. So when you log into
15 Instagram, you can see their feed -- their
16 posts -- excuse me -- in your feed.

17 Q. And you're not interested in seeing
18 posts from people on your feed other than the
19 six people you follow?

20 A. I'm -- I understand how Instagram
21 works. It doesn't mean I have to spend every
22 day on Instagram.

23 Q. It wasn't my question. You're not
24 interested in seeing posts in your feed other
25 than the six people that you follow?

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1 A. Well, not right now, no. I mean,
2 having -- having things fed to you is not the
3 only way to use Instagram, of course.

4 Q. You'd agree that's a typical way
5 that people use Instagram, by following people
6 and having their posts appear on their feed,
7 right?

8 A. Many people do. I don't know what
9 the numbers are.

10 Q. Do you know if that's the typical
11 way that people use Instagram, they follow
12 people and have their posts appear on their
13 feed?

14 A. I'm not sure what you mean by
15 "typical." As I said, many people do follow
16 people. I don't know how many people the
17 average person follows. I have no idea.

18 Q. You have a Facebook account as well,
19 right?

20 A. I do.

21 Q. And it's for your consulting agency,
22 right?

23 A. No, I have a personal Facebook
24 account. I think I also have a page, well, I
25 guess for consulting.

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1 Q. You have a public-facing Facebook
2 page for your consulting agency, right?

3 A. I'm not sure -- I may. I don't
4 know.

5 Q. Would you be surprised if that
6 public-facing Facebook page only has 146
7 followers?

8 A. No, not at all.

9 Q. You have a Twitter account as well,
10 right?

11 A. I do.

12 Q. And your Twitter account is
13 @ClickMensch, correct?

14 A. Right now it is. I'm going to
15 change that, but right now it is.

16 Q. Would you be surprised that you have
17 about 2,500 followers on Twitter?

18 A. No.

19 Q. You have a YouTube account as well,
20 right?

21 A. Yes, I do. Yeah.

22 Q. Would you be surprised that you have
23 less than 20 subscribers to your YouTube
24 account?

25 A. No.

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1 Q. You wouldn't consider yourself a
2 social media influencer, right?

3 A. No.

4 Q. You don't have a considerable
5 following on any social media account, right?

6 A. No, that's not true.

7 Q. What social media account do you
8 have a considerable following on?

9 A. Well, LinkedIn, I think -- I can't
10 remember what the number is on LinkedIn. It's
11 certainly north of 20,000.

12 Q. The one social media account that
13 you claim you have a considerable following on
14 is LinkedIn, right?

15 A. Yes.

16 Q. What's the purpose of LinkedIn, to
17 your knowledge?

18 A. Business connections.

19 Q. How does the purpose of LinkedIn
20 differ from the purpose of Instagram, to your
21 knowledge?

22 A. Well, LinkedIn is, as I say, more of
23 a business network. Instagram is more of a
24 personal network. That doesn't mean people
25 don't market through it. But Instagram is B to

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1 A. No.

2 Q. And would you be surprised to know
3 you've only tweeted a total of 88 times since
4 2018?

5 A. No.

6 Q. You would agree that your Twitter
7 posts receive minimal engagement, right?

8 A. I don't know the engagement. It's
9 quite possible.

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED] --

24 [REDACTED]

25 [REDACTED]

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10 BY MR. MISHRA:

11 Q. In the preparation of your rebuttal
12 report that's been introduced as Exhibit 1, did
13 you speak to any VPX employees?

14 A. I did not.

15 Q. Why not speak with VPX employees to
16 understand what their approach on Instagram is?

17 A. I didn't need to. I was rebutting
18 Professor Carpenter's report.

19 Q. You make a lot of statements in your
20 statement about the purpose of hashtags and the
21 purpose of captions and how consumers react to
22 captions and hashtags, right?

23 A. Yes.

24 Q. Why not ask VPX what they believe
25 about each of those things as a business that's

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1 communicating to consumers on Instagram?

2 A. I don't believe I needed to talk to
3 VPX. I was responding to Professor Carpenter's
4 report, and I didn't need to talk to VPX.

5 Q. Did you ask VPX if they agreed with
6 your conclusions in your rebuttal expert
7 report?

8 A. I haven't communicated directly with
9 VPX.

10 Q. Do you have any understanding of
11 whether VPX agrees with the statements that you
12 made in your rebuttal expert report?

13 A. I have not communicated with VPX nor
14 have I been told any kind of response from VPX.

15 Q. Did you speak with any of
16 defendants' other expert witnesses in this
17 case?

18 A. I did.

19 Q. Who did you speak with?

20 A. I spoke to Larry -- and I'm not sure
21 how to pronounce his last name, actually. I
22 think it's Chiagouris.

23 Q. And when did you speak with Mr.
24 Chiagouris?

25 A. Well, before I -- certainly before I

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1 factor for the energy product bank, right?

2 A. Correct.

3 Q. And you are not offering any
4 opinions on Dr. Carpenter's opinions relating
5 to internal VPX e-mails about the importance of
6 Super Creatine, right?

7 A. Correct.

8 Q. You have -- are you offering an
9 opinion in this case on the materiality of
10 VPX's advertising relating to the Super
11 Creatine in bank?

12 A. Can you repeat that?

13 Q. Are you offering an opinion in this
14 case whether VPX's advertising of Super
15 Creatine in bank is material?

16 A. Whether it's material? I mean, I'm
17 providing an opinion that's in my report or set
18 of opinions that's in my report. They are what
19 they are. They're focused on very specific
20 social media issues.

21 Q. I'm just trying to understand if
22 you're offering a broader opinion. Maybe I'll
23 ask it a different way. It seemed like you
24 were confused by the material word.

25 Are you offering an opinion in this

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1 case about whether VPX's advertising of Super
2 Creatine drives sales of Bang?

3 A. Oh, I see. No, I'm not, beyond
4 the -- beyond the fact that, as I point out in
5 my report, Professor Carpenter doesn't actually
6 show a mechanism through which they -- through
7 which that drives sales.

8 Q. You used the word "that." What are
9 you referring to?

10 A. The use of the term Super Creatine.

11 Q. But you only analyzed it in the
12 context of social media, right?

13 A. Correct.

14 Q. Okay. So other than your comment
15 that Dr. Carpenter doesn't show a mechanism
16 through which Instagram posts by VPX drives
17 sales, you have no opinion on whether the other
18 evidence he's included in his report shows that
19 the Super Creatine advertising drives sales,
20 fair?

21 A. Well, wait a second. I have a final
22 conclusion in my report where I point out that
23 Professor Carpenter doesn't show any kind of
24 nexus. He doesn't show any kind of connection
25 between this advertising and actual sales.

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1 So I don't believe -- even in the
2 areas of the report outside the social media
3 issues, I don't believe he shows any kind of
4 connection.

5 Q. Okay. Let's break that down. What
6 does nexus mean?

7 A. A connection between the two events,
8 a connection if you can draw a line between
9 these ads and somebody making a purchase. It's
10 my understanding he doesn't actually do that.
11 He talks about how frequently these claims are
12 made and then jumps to say this must drive
13 sales, but he doesn't actually show any kind of
14 mechanism through which this happened.

15 Q. Did you analyze for example VPX --
16 sorry, strike that.

17 Did you analyze consumer e-mails
18 that were sent to VPX about the Super Creatine
19 in Bang?

20 A. Not beyond what Professor Carpenter
21 has in his report.

22 Q. So if a consumer e-mailed VPX and
23 said, "Hey, I've been buying your Bang because
24 of the Super Creatine in it to increase my
25 creatine levels," you think that that's not

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1 sufficient to show a connection or a nexus as
2 you call it?

3 MR. BRANSON: Objection. Vague.
4 Incomplete hypothetical. Calls for
5 speculation.

6 You can answer.

7 THE WITNESS: I don't recall seeing
8 an e-mail in the report that was that
9 specific. I -- well, I don't recall an
10 e-mail like that. You could show me rather
11 than guessing.

12 BY MR. MISHRA:

13 Q. Did you review every single consumer
14 e-mail to VPX about Super Creatine that Dr.
15 Carpenter cited in his report?

16 A. I didn't view the e-mails myself. I
17 read the report where he discussed them.

18 Q. What would Dr. Carpenter have had to
19 do in his report to establish a nexus as you
20 call it?

21 A. I don't know.

22 MR. BRANSON: Objection. Beyond the
23 scope.

24 You can answer.

25 THE WITNESS: I don't know. That --

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1 that's out of my arena. It's a rebuttal
2 report. I've not done any work for him. I
3 don't know how he would have shown it.

4 BY MR. MISHRA:

5 Q. You have not conducted any analysis
6 to determine what would have needed to be done
7 to establish a nexus in this case.

8 MR. BRANSON: Same objections.

9 THE WITNESS: Correct.

10 MR. MISHRA: We've been going about
11 an hour. It's a good natural break point
12 for me. Do you want to take a break now?

13 THE WITNESS: That's fine by me.
14 Whatever you guys want.

15 MR. MISHRA: Let's go off the
16 record.

17 VIDEOTAPE TECHNICIAN: Going off the
18 record. The time is 9:02 a.m.

19 - - -

20 (Whereupon, a recess was held.)

21 - - -

22 VIDEOTAPE TECHNICIAN: We are back
23 on the record. The time is 9:16 a.m.

24 MR. MISHRA: Mr. Kent, I'm going to
25 introduce Exhibit 3 into the chat, and I

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1 will share it as well.

2 - - -

3 (Whereupon, the document was marked,
4 for identification purposes, as Defendant's
5 Exhibit 3.)

6 - - -

7 BY MR. MISHRA:

8 Q. Exhibit 3 is a copy of your CV; is
9 that correct?

10 A. Yes.

11 Q. And is this an up-to-date CV?

12 A. It's the most up-to-date I have. I
13 could update it, I suppose, but it's the most
14 up-to-date one I have.

15 Q. And if you were to update it, what
16 are you thinking of adding that you -- you said
17 if you could update it, you could. Sorry,
18 strike all that.

19 Is there anything missing in this CV
20 as it relates to your rebuttal expert report?

21 A. No.

22 Q. In this CV, do you see any reference
23 to the specific platform Instagram?

24 A. I doubt it.

25 Q. If you're an expert in Instagram why

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1 not include that in your CV?

2 A. I'm an expert in social media, which
3 includes Instagram. I talk about social media
4 and social media marketing.

5 Q. But you don't mention Instagram
6 specifically in your eight-page CV, right?

7 A. There are dozens of social media
8 platforms. I don't name them all. I don't
9 mention -- I don't think I mention any.

10 Q. Sure. My question was, you
11 mentioned social media networking and social
12 media marketing, but you don't specifically
13 mention Instagram in your eight-page CV, right?

14 A. That is probably correct.

15 Q. You refer to hashtags as used in
16 Instagram in your rebuttal report, right?

17 A. Yes.

18 Q. Do you know how many -- what's the
19 maximum number of hashtags somebody can put
20 into their posts?

21 A. I don't know the maximum number. I
22 think it's north of 30.

23 Q. Sorry, your testimony is it's higher
24 than 30; is that right?

25 A. Yes, but I don't know the specific

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1 number.

2 Q. Do you know the number of people you
3 can tag in a post on Instagram?

4 A. Oh. I don't know that number.

5 Q. Do you know the number of recent
6 likes that you can view on Instagram?

7 A. No.

8 Q. Do you know the maximum number of
9 accounts you can follow on Instagram?

10 A. No.

11 Q. Do you know the maximum number of
12 accounts that can follow you on Instagram?

13 A. The maximum that can follow you?
14 I'm not sure there is a maximum.

15 Q. Do you know the maximum number of
16 posts you can like per hour on Instagram?

17 A. No.

18 Q. Do you know the number of characters
19 you can use in a caption, the maximum?

20 A. No, I don't know that.

21 Q. Do you know what an Instagram reel
22 is?

23 A. Yes.

24 Q. What is an Instagram reel?

25 A. I believe it's the same as stories,

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1 Instagram story you can concrete. Of course
2 this case doesn't relate to stories or reels.

3 Q. Do you know when Instagram released
4 its story or reel feature?

5 A. I don't know when they started it,
6 no.

7 Q. Do you know if Instagram's release
8 of the reel or story feature changed user
9 behavior on Instagram?

10 A. Well, it must have changed user
11 behavior in some way.

12 Q. Do you know how the introduction of
13 the reel or story feature changed user behavior
14 on Instagram?

15 A. I don't know the specifics.
16 Obviously people are watching these stories.

17 Q. Do you know what the term handle
18 means?

19 A. Handle?

20 Q. Yeah.

21 A. In a general sense, on social media
22 a handle is somebody's name on the account or
23 in the system.

24 Q. Do you know what InstaMeet means?

25 A. I believe there is a meeting

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1 function you can use through Instagram.

2 Q. What do you mean "a meeting function
3 you can use through Instagram"?

4 A. I think you can have live
5 communication between parties, but it's not a
6 feature I've used.

7 Q. Are you referring to Instagram Live?

8 A. I think that may be the same thing
9 or associated, but, again, it's not a feature
10 I've used.

11 Q. Sorry, just to confirm, so your
12 testimony is your belief is that InstaMeet is
13 equivalent to Instagram Live; is that correct?

14 A. I don't know. I think they may be
15 associated but again these are not features
16 I've used on Instagram, and they're not
17 features that are involved in this case either.

18 Q. Have you heard of the term
19 latergram?

20 A. I've heard of the term. I assume
21 it's a scheduling thing.

22 Q. What does the term latergram mean?

23 A. Are you saying latergram?

24 Q. Correct.

25 A. I'm assuming it's a scheduled post

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1 that will automatically submit later, but I
2 don't know for sure.

3 Q. Do you know what image can be used
4 on Instagram?

5 A. Well, certainly PNG, JPG and GIF,
6 plus video formats. I'm not sure what video
7 formats you can use.

8 Q. Do you know the maximum size that
9 somebody can use for images on Instagram?

10 A. No.

11 Q. Do you know the maximum length for a
12 video on Instagram?

13 A. No, I don't know that.

14 Q. Do you know the minimum length for a
15 video on Instagram?

16 A. No.

17 Q. Let me take you to paragraph 21 of
18 your expert report. It's on page 8. And I
19 will put it up on the screen. Sorry, paragraph
20 21.

21 And you see paragraph 21 you write,
22 Professor Carpenter also provides a table
23 showing, quote, the number of posts published
24 by VPX that promote Super Creatine or creatine
25 in connection with Bang Energy or the overall

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1 Bang Energy brand from seven different
2 Instagram accounts operated by defendants as
3 shown below, and then you include the chart,
4 right?

5 A. Yes.

6 Q. Are you offering the opinion that
7 any of these Instagram -- any of these accounts
8 are not controlled by VPX?

9 A. No, why? I'm not sure -- I guess
10 I'm not sure what you're asking because that
11 question doesn't seem to relate to my report.

12 Q. It's just a preparatory question.
13 You're not disagreeing with Professor Carpenter
14 that these accounts are controlled by VPX,
15 correct?

16 A. No, I'm not disputing that, no.

17 Q. And you write in paragraph 22 that
18 Professor Carpenter determined which posts are
19 promoting creatine or Super Creatine by
20 searching the post captions for the word
21 creatine. Those that contain that text were
22 included in the second column in the chart
23 above, right?

24 A. Yes.

25 Q. Are you aware of Dr. Carpenter

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1 course there are also -- there are different
2 purposes. People are doing different things.
3 Some people are getting involved in more of a
4 discussion with their -- with their followers.
5 But still predominantly Instagram is an
6 image-sharing system.

7 Q. And the survey you're referring to
8 is a survey by Preview App, Pty Ltd.; is that
9 correct?

10 A. Yes.

11 Q. Any other citations that you have in
12 support of your claim that Instagram readers
13 don't visit the site to read, they visit to
14 view?

15 A. I don't know. Let me have a look.

16 I don't see any other citations. Of
17 course it's also based on my knowledge and
18 experience in the arena.

19 Q. By "arena," you mean social media
20 generally?

21 A. Well, social media generally;
22 Instagram in particular. I know you're not
23 supposed to use the word common sense in the
24 legal business, but it's just common sense that
25 that's what it is; it's a photo sharing

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1 system -- or an image -- excuse me, image and
2 video these days, image and video sharing
3 system.

4 Q. You write here, But the picture is
5 the point. Without the picture or video the
6 text is pointless, and often a picture doesn't
7 need a caption. In fact, captions are often
8 just rambling nonsense.

9 Do you see that?

10 A. I do.

11 Q. What's your evidence for the fact
12 that captions are often just rambling nonsense?

13 A. Well, I'm not sure how to measure
14 rambling nonsense scientifically, but if you
15 read many posts online -- on Instagram, they
16 appear to be rambling nonsense.

17 And, you know, I have an example
18 from the defendant here. It appears to be just
19 rambling nonsense. And I would argue that
20 people are more interested in the video than
21 what is being said next to the video.

22 Q. So your claim that captions are
23 often just rambling nonsense is based on your
24 experience reading on Instagram; is that
25 correct?

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1 A. I would say my experience with
2 language in general.

3 Q. I don't really understand that
4 answer.

5 My point is, you're drawing a
6 conclusion that captions are often just
7 rambling nonsense. Your conclusion that
8 they're often just rambling nonsense is based
9 on your experience reading posts on Instagram;
10 is that correct?

11 A. Yes.

12 Q. Anything else?

13 A. Not that I can think of right now.

14 Q. You write in paragraph 31,
15 Regardless of why Instagram users enjoy looking
16 through pages of photos and videos, a billion
17 do so each month. The pictures and videos are
18 the most important feature of a post, and one
19 cannot view a post without seeing the
20 photograph and at least the video's preview
21 image. And yet one can view the post without
22 reading the caption.

23 Do you see that?

24 A. I do.

25 Q. When you -- do you know if users use

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1 Instagram more on a desktop computer or through
2 an app on a phone?

3 A. Probably mostly through the app.

4 Q. Do you know when you go through
5 posts on the Instagram app on your phone what
6 appears below the video or the picture?

7 A. What appears below it? I think it's
8 the caption.

9 Q. So somebody could -- when somebody
10 is scrolling through their feed they're
11 necessarily seeing the image or video followed
12 by the caption, right?

13 A. Yes. Is there a question beyond
14 that?

15 Q. No, that was my question.

16 In paragraph 32 you ask us to
17 consider the post at this Instagram link, which
18 is then copy pasted below, right?

19 A. Yes.

20 Q. How did you choose this post as your
21 example in your expert report?

22 A. Well, it's an example of something
23 that's frequently going on. I don't remember
24 why I picked this one. I picked it from
25 Professor Carpenter's data set.

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1 his list.

2 BY MR. MISHRA:

3 Q. How do you confirm this is one of
4 the posts that was on Professor Carpenter's
5 list?

6 A. Well, I'm pretty sure I got it out
7 of his list. His spreadsheet he provided had
8 URLs pointing to the posts, and I'm pretty sure
9 that's where I got this one, and I clicked on
10 it and it took me to Instagram.

11 Q. My question was slightly different.
12 How do you know that this post is
13 included as one of the posts in this table that
14 total up to 1,015?

15 A. Again, I took it out of his data
16 set.

17 Q. Well, his data set included both
18 posts that weren't included in his table and
19 were included in his table, right?

20 A. It depends what you're referring to.
21 He had -- he referred to an Appendix D, I think
22 it was, in his report and didn't -- he didn't
23 say where he got the -- he didn't say where he
24 got all this data from. Well, A, he didn't say
25 how he got the data. B, he talks about the

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1 posts that don't include the word creatine, but
2 he didn't provide a data set.

3 I was provided with that data later.
4 I asked for it. I asked if we had it, and I
5 was provided a file later on that was the sort
6 of negative data.

7 Q. So your belief that this post was
8 included as one of the posts in that table is
9 based on your interpretation of Dr. Carpenter's
10 data, correct?

11 A. I'm not sure what you mean by that.
12 My recollection is that this was one of the
13 posts included in his initial data.

14 Q. In your next section starting in
15 paragraph 34 you talk about users and whether
16 they read captions, right?

17 A. Yes.

18 Q. And you cite in paragraph 35 a
19 survey from an Instagram tools company called
20 Preview App, Pty, Ltd., right?

21 A. Yes.

22 Q. How did you find this survey?

23 A. I did a search looking for this kind
24 of data.

25 Q. Other than this survey, did you find

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1 anything else?

2 A. I don't think I did, but I didn't
3 look for an extensive period of time. Perhaps
4 I could have found more if I spent more time.

5 Q. Did you read any academic articles
6 about the use -- about users and their
7 engagements with captions on social media?

8 A. I don't know if I saw any.

9 Q. Are you aware of an academic article
10 called integrating text and image relating to
11 Instagram?

12 A. I don't believe I've seen that. I'd
13 love to see it.

14 Q. Have you heard of an academic
15 article about motivations for using Instagram?

16 A. I don't recall seeing that.

17 Q. Do you consider this survey by
18 Preview App, Pty, Ltd. to be a scientific
19 survey?

20 A. I wouldn't call it scientific. It's
21 what it is, they ask people and got responses.

22 Q. And to your knowledge, how did the
23 company decide what people to ask its questions
24 to in connection with this survey?

25 A. My understanding is they posted an

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1 image asking that question in their Instagram
2 account.

3 Q. Do you know what the company Preview
4 App, Pty Ltd. does?

5 A. It's my understanding that they
6 provide Instagram software, software that
7 integrates with Instagram to help you manage
8 your Instagram account.

9 Q. Do you think that the answers to the
10 questions that Preview App posted on their
11 Instagram account are representative of all
12 Instagram users?

13 A. That I -- that I don't know.

14 Q. Do you know the demographics of the
15 respondents to Preview App's questions on
16 Instagram?

17 A. I don't know.

18 Q. Did you contact Preview App to learn
19 more information about this survey they did on
20 Instagram?

21 A. I did not.

22 Q. And you say that preview -- sorry,
23 strike that.

24 You write that Preview's overall
25 conclusion was 35 percent of people said they

CONFIDENTIAL TRANSCRIPT

1 always read captions, right?

2 A. Yes.

3 Q. And 65 percent said they don't
4 always read captions, right?

5 A. Yes.

6 Q. And 35 percent of people read, from
7 what Preview found, captions on every post,
8 right?

9 A. That's what it says.

10 Q. And of these 65 percent you would
11 agree that some or even many may read captions,
12 right?

13 A. Correct.

14 Q. So it's possible that more than
15 50 percent of people often read captions, fair?

16 MR. BRANSON: Objection. Assumes
17 facts. Calls for speculation.

18 THE WITNESS: I don't know what the
19 specific number would be. This data clearly
20 shows that people don't always read
21 captions. And, in fact, as we scroll down,
22 it shows people say, "Well, I'll skim it or
23 maybe I'll read it if I'm interested or it
24 looks useful," and so on.

25 So my point here is, people don't

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- - -

MR. MISHRA: Let me know when you
have it.

BY MR. MISHRA:

Q. Have you seen this document before?

A. The Web page, URL?

Q. Yes. Have you seen the Web page
starting on page 2 of 4?

A. Well, I don't see -- it just opened.
It looks like the one. Is that the one I cite
to in my report?

Q. I'm happy to -- here's the link
here, and you can compare that to footnote 5 in
your report.

That's the link you cite to in
footnote 5 of your rebuttal report, correct?

A. Let's have a look. Where is
footnote 5?

Q. It's on page 14.

A. Page 14? Page 14, footnote 5. Yes,
it looks like the page, yeah.

Q. And this is the -- this is the
article that you rely on in your rebuttal
expert report, right?

A. Yes, or one of them. Uh-huh.

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1 Q. And one of -- and here in the
2 summary section of the article it says the
3 majority of people will read captions, but it
4 depends on a few things, right?

5 A. Yeah.

6 Q. One thing it mentions is that the
7 photo is important. If it catches people's
8 attention, they're more likely to check out the
9 caption, right?

10 A. Yes.

11 Q. The first sentence in your caption
12 is super important and it needs to be catchy,
13 right?

14 A. Yes.

15 Q. Do you disagree with anything in
16 items one through three of this summary?

17 A. No, I don't disagree. The point I
18 was making is, people don't always read
19 captions, and it doesn't contradict that.

20 Q. You haven't quantified how often
21 people read captions, right? Fair?

22 A. Correct.

23 Q. And other than this study from
24 Preview App, you have no data indicating what
25 percentage of time people read captions, fair?

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1 A. Correct.

2 Q. I'm going to go back to your --

3 MR. BRANSON: Is this a good time to
4 break or are you --

5 MR. MISHRA: If we could get five
6 minutes, that would be great, yeah.

7 MR. BRANSON: Okay.

8 BY MR. MISHRA:

9 Q. I'm going to go back to your expert
10 report. You list the responses gathered by
11 Preview in paragraph 37 of your report, right?

12 A. Yes.

13 Q. And you would agree that there are
14 plenty of people here who say they read
15 captions most of the time, right?

16 A. I don't know that that's true. I
17 mean this guy says he reads them. He doesn't
18 say most of the time. Again, I wasn't -- I
19 wasn't saying nobody reads captions. My report
20 is quite clear here. The point is people don't
21 always read captions.

22 Q. And your point -- to short-circuit
23 this, is your point in your report then just
24 because somebody liked a post or viewed a video
25 doesn't mean that they necessarily read the

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1 word creatine in the post?

2 A. That is certainly true.

3 Q. But you have no opinion on what
4 percentage of time people watch a video or like
5 a post they've actually read the post including
6 the word creatine in the post, fair?

7 A. Correct, I have no way to know that.

8 MR. MISHRA: Okay. We can take a
9 break now. Let's go off the record.

10 VIDEOTAPE TECHNICIAN: Going off the
11 record at 10:18 a.m.

12 - - -

13 (Whereupon, a recess was held.)

14 - - -

15 VIDEOTAPE TECHNICIAN: We are back
16 on the record. The time is 10:33 a.m.

17 BY MR. MISHRA:

18 Q. Mr. Kent, I next want to ask you
19 just about your knowledge of Instagram as just
20 a social media account generally. So I'll ask
21 a different question.

22 You agree that Instagram users have
23 conversations on Instagram, right?

24 A. Some do.

25 Q. Do you know how many, what

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1 percentage of Instagram users have
2 conversations on Instagram?

3 A. I don't.

4 Q. And you would agree that some of
5 those conversations occur in the comments
6 section of the Instagram accounts right?

7 A. Yes.

8 Q. Have you seen any examples of Mr.
9 Owoc having any conversations with consumers in
10 the comments of his Instagram posts?

11 A. I'm sorry, I didn't catch that.
12 Have I done what?

13 Q. Have you seen any examples of Mr.
14 Owoc having any conversations with consumers in
15 the comments of his Instagram posts?

16 A. Have I seen? Yeah, I think I have.

17 Q. Do you have an opinion on whether a
18 user having a conversation with the author of
19 the post indicates whether or not the user read
20 the post?

21 A. Well, I think it depends on context.
22 I think there are many conversations going on.
23 In one or two of my examples, for instance,
24 people are replying to -- somebody comments and
25 somebody replies to the comment, but it's not

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1 clear whether the initial comment is actually
2 in response to the image or caption. So it
3 depends on context.

4 Q. So, for example, if somebody
5 mentions creatine in the comment on a post that
6 also mentions creatine, you would agree it's
7 likely they read the post, right?

8 MR. BRANSON: Objection. Assumes
9 facts. Calls for speculation.

10 You can answer.

11 THE WITNESS: Well, I think it's
12 certainly possible. I mean, again, it
13 depends on context.

14 BY MR. MISHRA:

15 Q. And if they quote something in the
16 post that's in the video, you'd agree that they
17 likely read the post, right?

18 A. In that case, yes.

19 Q. Have you done an analysis to
20 determine what percentage of consumers who
21 comment on Bang Energy's posts read the posts?

22 A. Well, it wasn't -- it wasn't my task
23 to do any kind of analysis beyond analyzing
24 Professor Carpenter's opinions in evidence.

25 Q. So you did not do an analysis to

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1 determine what percentage of consumers who
2 comment on Bang Energy's Instagram posts
3 actually read the posts, right?

4 A. No, of course not. I mean, that
5 wasn't part of Professor Carpenter's opinions.

6 Q. The video that we have talked about
7 with the picture of the -- the video of the
8 woman that you included in your report, do you
9 recall that video?

10 A. The one we looked at a few minutes
11 ago?

12 Q. Yes, in paragraph 33 of your report?

13 A. If you say so. I don't have --

14 Q. I will pull it up. Do you recall
15 this video that you included in paragraph 33 of
16 your report?

17 A. Yes.

18 Q. Did you watch this video?

19 A. I did.

20 Q. Do you recall if the Bang can
21 appeared in this video?

22 A. Offhand, I don't remember if it did.

23 Q. Do you recall if any Bang Energy
24 product appeared in the video?

25 A. I don't recall.

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1 Q. You offer the opinion that comments
2 don't equal reads, correct?

3 A. Correct.

4 Q. Comments are another indicator of
5 potential engagement with the post, right?

6 A. With a post, yes.

7 Q. I'm going to go back to your report
8 again. In paragraph 47 you write, Thus, the
9 primary content, the content being liked, is
10 clearly the picture or video, not the caption.
11 So the number of likes is not directly related
12 to the content of the caption.

13 Do you see that?

14 A. Yes.

15 Q. It's possible that somebody liked a
16 post because of the caption though, right?

17 A. It is possible, yes.

18 Q. You haven't done an analysis about
19 which percentage of likes were because of the
20 caption as compared to the picture or video,
21 right?

22 A. I have not done such an analysis.
23 And again, it wasn't my job to do so. It's
24 Professor Carpenter's report.

25 Q. Can you tell me what your basis for

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1 on their phone?

2 A. Again, I don't know the exact
3 numbers, but it's quite likely more often on a
4 mobile. I haven't seen the numbers.

5 Q. And you say, All the viewer has to
6 do is click into the add a comment box in the
7 bottom right of the post, type something and
8 click the post button or just press enter,
9 right?

10 A. Yes.

11 Q. And a viewer can quickly enter a
12 comment at the end of the post without ever
13 having read the post, right?

14 A. Yes.

15 Q. When you try to comment on the
16 mobile app of the Instagram -- so -- sorry,
17 strike that.

18 When you're scrolling through your
19 feed on Instagram, the full post is not posted
20 in your feed.

21 Do you agree with that?

22 A. The full post? The caption?

23 Q. The full -- sorry, yeah, let me --
24 let's strike that. Let me use the right term.

25 When you're scrolling through your

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1 feed on Instagram, the full caption is not
2 immediately displayed in the feed, right?

3 A. That's true on the desktop version
4 as well.

5 Q. When you click to comment on an
6 Instagram post, do you know if the full caption
7 appears?

8 A. On mobile you're saying?

9 Q. On mobile, yes.

10 A. That I'm not sure.

11 Q. Would it change your opinion at all
12 in your report if when you try to comment on a
13 mobile app, you receive the full caption before
14 you comment?

15 A. Well, not particularly, because if
16 you click into that comment and you haven't
17 seen the post, your intent was to comment
18 without yet having seen the post -- seen the
19 caption.

20 Q. But you agree if the next view that
21 comes up when you click to comment is the
22 entire post -- the entire caption, that it's
23 more likely that the user reads the caption
24 because the entire caption appears, right?

25 A. Well, if that's correct -- and I

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1 need to go back to check. But if that is
2 correct, it's more likely that they will end up
3 reading it. That's true. It doesn't change
4 the fact that they may not read it and that
5 they have decided to comment before they've
6 read it.

7 Q. Are you familiar with the term
8 lifestyle marketing?

9 A. Yes.

10 Q. What is lifestyle marketing?

11 A. Well, I don't pretend to be an
12 expert in lifestyle marketing. I believe it
13 is -- my understanding of the term is that it
14 relates to reaching people -- well, for
15 instance, the sort of thing the defendant does
16 where they're feeding people content that
17 they're going to like, that they're going to --
18 like all the rap dancers, I think there's a lot
19 of parties that they are sending video of
20 people dancing and so on. It isn't directly
21 saying, "Hey, buy this product," but it's an
22 attempt just to make a connection with people.

23 Q. Have you, yourself, ever worked on a
24 social media marketing campaign with
25 influencers non-Instagram?

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1 A. I haven't, no.

2 Q. Have you ever worked on a social
3 media marketing campaign based in lifestyle
4 marketing towards young men?

5 A. I wouldn't think so.

6 Q. Have you ever worked on a social
7 media marketing campaign geared towards energy
8 drink consumers?

9 A. No.

10 Q. Let's move on to your discussion of
11 hashtags. I know you describe it in your
12 report.

13 Can you tell me just generally, when
14 did you first become aware of the use of
15 hashtags on social media?

16 A. I don't recall. Years ago. They've
17 been around I don't remember how many years.
18 Anyway, a long time.

19 Q. Are hashtags used the same way on
20 different social media accounts, for example,
21 LinkedIn, Twitter, Facebook, Instagram?

22 MR. BRANSON: Objection. Vague.
23 You can answer.

24 THE WITNESS: Pretty much. A
25 hashtag is an indexable keyword. That's the

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1 Q. Are you aware that the user of a
2 page has access to those metrics?

3 A. To the accountholder you mean? Yes,
4 I believe so.

5 Q. Did you ask VPX how many -- how much
6 of their traffic originated from #createine on
7 their Instagram posts?

8 A. No, I didn't.

9 MR. BRANSON: Asked and answered.
10 BY MR. MISHRA:

11 Q. You offer the opinion that hashtags
12 are not designed for the post viewer to read,
13 right?

14 A. Yes.

15 Q. And is the reason that it's not
16 designed for the post viewer to read because
17 it's supposed to be a tool to gather engagement
18 for the post, rather than provide a substantive
19 comment for the user to read?

20 A. I don't know what you mean by that,
21 "gather engagement for the post." It's an
22 indexing tool.

23 Q. What's the purpose of indexing?

24 A. So the purpose of indexing is to
25 help the post get found.

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1 Q. And what's the purpose of wanting a
2 post to be found?

3 A. To get people to see it.

4 Q. For more people to be engaged with
5 the post, right?

6 A. Sure.

7 Q. My question is, you're saying that
8 they're not designed for the post viewer to
9 read. You're not saying that viewers of posts
10 don't read the captions, right?

11 A. I'm not saying that some viewers
12 don't occasionally read the hashtags. I am
13 explaining what the hashtags are for, and I'm
14 explaining that a lot of people push them down
15 because they don't even really want people to
16 see them. Clearly these are not intended to be
17 read. They're intended to help indexing.

18 Q. Have you seen any study about what
19 percentage of users read hashtags?

20 A. I have not. And I recall in my
21 report I also point out that you don't really
22 want them to read the hashtags.

23 Q. Why don't you want them to read the
24 hashtags?

25 A. If somebody reads a hashtag and

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1 clicks on it, it will take them away from your
2 post to a page that doesn't belong to you that
3 is full of other people's posts, including
4 competitors.

5 Q. Reading and clicking are two
6 different things, right?

7 A. I won't argue with that.

8 Q. You could want somebody to read the
9 hashtag so that they associate the hashtag with
10 your brand, right?

11 A. I suppose in theory, but if you want
12 something to be read, you're putting it in the
13 caption, not in the hashtag block.

14 Q. You offer an opinion that most
15 marketers put hashtags in the comments rather
16 than the main post; is that right?

17 A. I don't recall if I said most. Did
18 I say most?

19 Q. Sorry, that's my fault. You
20 actually cite a study that found -- in
21 paragraph 71 of your report, you cite a study
22 that found that only 6.2 percent of posts place
23 their hashtag blocks in the first comment,
24 right?

25 A. That's correct.

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1 Q. And VPX posts its hashtags in its
2 caption, not in the comments, right?

3 A. Correct.

4 Q. Did you ask anyone at VPX about why
5 they put the hashtags in the post rather than
6 the comments?

7 A. I did not.

8 Q. Is it possible that the reason that
9 they put the hashtags in the caption rather
10 than the comments is because they want users to
11 see the hashtags?

12 MR. BRANSON: Objection. Calls for
13 speculation. Lacks foundation.

14 You can answer.

15 THE WITNESS: Yeah, I don't -- I
16 don't know. I have no idea why they do
17 that.

18 BY MR. MISHRA:

19 Q. You write in paragraph 73, quote,
20 when a marketer adds hashtags to a post, the
21 intention is that the post may be found within
22 all those hashtag pages, increasing the
23 likelihood that it will be seen, right?

24 A. Yes.

25 Q. If you assume that there is no

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1 creatine in Bang, then wouldn't you agree using
2 the term #creatine to get people to see your
3 page about Bang from the global creatine page
4 is deceptive?

5 MR. BRANSON: Objection. Vague.
6 Calls for a legal conclusion. Lacks
7 foundation. Outside the scope.

8 THE WITNESS: I don't know if it's
9 deceptive. This isn't something I discussed
10 in the -- in the report.

11 I mean, it -- you know, I've done a
12 lot of work with search engine optimization.
13 So this is sort of a similar issue. It's
14 all about search. It's all about finding
15 pages when somebody searches. You are
16 sometimes trying to get your posts into a
17 page that is being seen by people that may
18 be a good market for you.

19 So if I'm selling running shoes, I
20 might want -- I might use a hashtag that
21 gets me onto a page for bodybuilders. No,
22 the post isn't about bodybuilding, but it is
23 related to a product bodybuilders might be
24 interest in.

25 So I don't know the answer to that

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1 question. I'm not going to just say, yes,
2 it's deceptive.

3 BY MR. MISHRA:

4 Q. So your claim is that if Bang says
5 #creatine, even if the product doesn't have
6 creatine, that's not necessarily deceptive
7 because they could just be trying to get people
8 or a demographic that would want creatine
9 without actually saying that their product
10 contains creatine; is that correct?

11 MR. BRANSON: Same objections.

12 THE WITNESS: Well, first, I don't
13 know if it's true that it doesn't have
14 creatine. It's my understanding it's -- I
15 mean, that's way out of my area of
16 expertise, of course. It's my understanding
17 that there may be a dispute about that fact.

18 But, again, you're not always trying
19 to -- well, it's like pay-per-click
20 advertising where you bid on a competitor's
21 trademark. All of the major pay-per-click
22 networks allow that, and the courts in North
23 America have accepted that as an acceptable
24 thing to do, to bid on somebody else's
25 trademark. You're trying to appear in front

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1 of people who may be interested in your
2 products.

3 BY MR. MISHRA:

4 Q. Is it common to hashtag names of
5 ingredients on a product page that the product
6 doesn't contain, in your experience?

7 A. I've never done a survey to find
8 out.

9 Q. Just in your experience as an
10 Instagram expert, is it common to hashtag names
11 of ingredients on a product page, even though
12 the product doesn't contain that ingredient?

13 A. I don't know. I've never -- I've
14 never looked to see. When I use Instagram, I'm
15 typically looking at landscape photographers.
16 I'm not looking at nutritional suppliers. So I
17 don't know what the -- what is normal.

18 MR. BRANSON: Let me know when
19 there's a good time to break here.

20 MR. MISHRA: I think now is good. I
21 understand that we normally take a lunch
22 break, but I don't have too much more. So
23 if you could give me about ten minutes to
24 just refine, and then hopefully we can end
25 it after -- after that break.

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1 MR. BRANSON: Okay. If you don't
2 mind, can we take 20 because I got to take a
3 call real quick? Is that okay?

4 MR. MISHRA: It will help me refine
5 more. So that's fine.

6 VIDEOTAPE TECHNICIAN: Going off the
7 record at 11:32 a.m.

8 - - -

9 (Whereupon, a recess was held.)

10 - - -

11 VIDEOTAPE TECHNICIAN: We are back
12 on the record. The time is 11:56 a.m.

13 BY MR. MISHRA:

14 Q. Mr. Kent, I'm going to share the --
15 your expert report again, which is Exhibit 1 to
16 this deposition. I wanted to go to the picture
17 on page 34 of your report.

18 Do you see the screenshot on page
19 34?

20 A. Yes.

21 Q. What is this the screenshot of?

22 A. The creatine hashtag page.

23 Q. And do you have any understanding of
24 what this Amino Energy product is right here on
25 this page?

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C E R T I F I C A T E

I do hereby certify that I am a Notary Public in good standing, that the aforesaid testimony was taken before me, pursuant to notice, at the time and place indicated; that said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said deponent was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the deposition is a true and correct record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this 18th day of July, 2021.



Deborah L. Williams, CCR, CLR
Notary Public